

# Reflections on the Colombian case law on the protection of medical personnel against punishment

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## Abstract

*One of the fundamental rules for the protection of health-care personnel in any circumstance, including contexts of armed conflicts, provides for a prohibition on punishing medical professionals who merely act in accordance with medical ethics. However, although the reasons for this prohibition may seem obvious, in contexts of non-international armed conflicts the provision of medical care to wounded and sick members of non-state armed groups can expose medical personnel to accusations of participation in criminal activities. Based on the Colombian domestic legislation and jurisprudence on the matter, this article aims to propose elements of analysis on the apparent contradiction that exists between, on the one hand, the prohibition against punishing medical personnel for merely providing health care to the wounded and sick who need it, and on the other, the prerogative of the state authorities to restore order and security within their territory through the imposition of criminal sanctions on members of non-state armed groups or their aiders and abettors.*

**Keywords:** health care, Colombia, violence against health care, protection of medical personnel against punishment.

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The ongoing non-international armed conflict taking place in Colombia is one of the longest in modern history and has changed greatly over time. Its beginning can be dated back to the first half of the twentieth century with a violent polarisation between the liberal and conservative political parties. During the 1960s, new actors emerged within the conflict in the form of guerrilla groups, amongst which the main ones that remain today are the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) and the *Ejército de Liberación Nacional* (ELN).<sup>1</sup> Other armed actors, such as the *Autodefensas Unidas de Colombia* (AUC), emerged in the 1970s, gained in strength in the 1980s, and were consolidated during the 1990s. Since 1982, there have been attempts at peace and reconciliation, with the introduction of several legal frameworks,<sup>2</sup> including the Law for Justice and Peace of 2005.<sup>3</sup> Later on, other armed groups emerged as part of the '*bandas criminales*'/BACRIM ('criminal bands'), including the so-called '*Urabeños*' and '*Rastrojos*'. The latest developments include the current peace dialogue between the Colombian government and the FARC-EP, which formally started in October 2012.

The scope of the present paper is to analyse how the Colombian authorities have legally addressed the norms related to the protection of the medical mission, specifically in relation to the prohibition on punishing medical personnel<sup>4</sup> for merely carrying out medical activities compatible with medical ethics. Indeed, Article 10 of Additional Protocol II to the Geneva Conventions of 1949 (hereinafter AP II) establishes fundamental obligations for the parties to non-international armed conflicts with respect to the general protection of the medical mission, namely: (i) a prohibition on punishing any person for the mere fact of having carried out medical activities compatible with medical ethics; (ii) a prohibition on compelling persons engaged in medical activities to perform acts that are contrary to, or to refrain from acts required by, the rules designed to protect the wounded and sick; (iii) an obligation to respect the medical personnel's right to reserve information concerning the wounded and sick being attended; and (iv) a prohibition on punishing persons engaged in medical activities for failing to give that information.<sup>5</sup>

1 Other guerrilla groups that emerged during the 1960s and subsequent decades, and that demobilised after participating in negotiations with the government, are the M-19 (1990), *Ejército Popular de Liberación* (EPL, 1991), *Partido Revolucionario de los Trabajadores* (PRT, 1993), and *Quintín Lame* (1991).

2 One of the most relevant laws is Law 418 of 26 December 1997, by which some instruments for seeking coexistence, effective justice, and other provisions are adopted.

3 Law 975 of 25 July 2005, which dictates provisions for the reincorporation into society of members of illegal armed groups who contribute effectively to the achievement of national peace, and for other humanitarian agreements.

4 Throughout the text, we will use 'health-care personnel' and 'medical personnel' interchangeably.

5 Second Additional Protocol to the Geneva Conventions of 12 August 1949 (hereinafter AP II), Art. 10. See also ICRC, *Customary International Humanitarian Law*, Vol. I: Rules, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rule 26 (applicable in international and non-international armed conflicts).

Although the protection of the medical mission is a clear complement to the right of the wounded and sick to be cared for,<sup>6</sup> in some circumstances health-care personnel may be perceived as being members of the armed group or as its aiders and abettors. Hence, in order to comply with the rules on the protection of medical personnel under international humanitarian law (IHL), a line has to be drawn between membership in the armed group as a health-care professional on the one hand, and mere exercise of the principle of social solidarity on the other. The latter principle requires that any person, doctor or not, carry out humanitarian actions when faced with situations that endanger the life or health of fellow individuals.

The judicial approach to the provision of health services to members of armed groups in Colombia has changed over the years, from an automatic inclusion of the health-care activities of medical personnel in the crime of rebellion, to the introduction of humanitarian arguments for their protection in the judges' reasoning after the adoption of IHL rules in national legislation. However, sentencing of medical personnel in Colombia is still a risk<sup>7</sup> since the threshold above which medical services exceed the principle of social solidarity and become punishable under domestic criminal law<sup>8</sup> remains unclear due to the wide scope of activities that may be carried out by medical personnel in the course of their medical duties, in the context of a non-international armed conflict.

The objective of this article is to present some relevant attempts to delineate the notion of protected medical activities within the Colombian legal system. Indeed, an overly broad interpretation of what constitutes support to a non-state armed group could seriously undermine the treatment and care that health-care personnel can provide to sick and wounded persons belonging to these groups. This paper will first recount the IHL rules prohibiting the punishment of medical practitioners for having carried out activities in conformity with medical ethics, and their implementation in Colombian law. It will then introduce an analysis of the crime of rebellion and its actual application in case law, which is often applied to accuse health-care personnel of being members of non-state armed groups in the country.<sup>9</sup>

6 Arts. 7-8 of AP II; ICRC Customary Law Study, Rule 110 (applicable in international and non-international armed conflicts).

7 See, for example, Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 27227 of 21 May 2009, p. 13.

8 According to the ICRC's commentary on Art. 3 of AP II, states may 'take appropriate measures for maintaining or restoring law and order' only through legitimate means, such as the adoption of legislation; hence, 'imperative needs of State security may not be invoked to justify breaches of the rules of the Protocol'. See Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (hereinafter ICRC Commentary), paras. 4500-4501.

9 The present article will focus only on the definition and application of the crime of rebellion, which is considered a political crime, although members of non-state armed groups may also be condemned for the crimes of terrorism, complicity, extortion, kidnapping, drug trafficking, etc.

## The protection of medical personnel in IHL and Colombian law

### The rules of IHL on the protection of medical personnel

The IHL notion of ‘medical duties’ (or ‘medical activities’) under Article 10 of AP II refers to ‘the tasks which personnel perform in accordance with their professional obligations when they give care or treatment’.<sup>10</sup> The Commentary to the Additional Protocols further states that this notion should be interpreted very broadly as meaning not only care and treatment, but also activities such as ‘issu[ing] death certificates, vaccinat[ing] people, mak[ing] diagnoses, giv[ing] advice, etc.’<sup>11</sup>

The personnel who ‘carr[y] out medical duties’ include not only doctors but also ‘any other persons professionally carrying out medical activities, such as nurses, midwives, pharmacists and medical students who have not yet qualified’.<sup>12</sup> It is important to note that this list of medical personnel is not exhaustive, and that it should also be understood as including persons such as ‘paramedical staff including first-aiders, and support staff assigned to medical functions; the administrative staff of health-care facilities; and ambulance personnel’.<sup>13</sup>

As for the prohibition against punishing anyone having carried out medical activities in accordance with medical ethics, ‘[t]he reference to punishing is meant to cover all forms of sanction, including both penal and administrative measures’.<sup>14</sup> In this regard, it should be noted that the practice of international organisations like the United Nations (UN) reveals that, in situations of armed conflict, under no circumstances should medical personnel be punished for their medical activities if those activities have been carried out in accordance with medical ethics.<sup>15</sup> This prohibition has also been endorsed by the Council of Europe and the World Medical Association.<sup>16</sup>

Additionally, the IHL prohibition on punishing anyone for the mere fact of providing medical services is complemented by the need to respect the confidentiality of information that may be acquired while providing such care.<sup>17</sup> The protected information covers ‘any information that doctors may obtain from their patients in the course of the delivery of medical care, and not just details

10 ICRC Commentary, para. 4679.

11 *Ibid.*, para. 4687.

12 *Ibid.*, para. 4686.

13 ICRC, *Health Care in Danger: Making the Case*, August 2011, p. 14, available at: [www.icrc.org/eng/assets/files/publications/icrc-002-4072.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4072.pdf) (all internet references were last accessed in February 2014).

14 ICRC Commentary, para. 4691.

15 GA Res. 44/165, 15 November 1989.

16 Council of Europe, Parliamentary Assembly, Resolution 904 of 30 June 1988, Appendix, para. 1; Regulations of the World Medical Association in Times of Armed Conflict, adopted by the 10<sup>th</sup> World Medical Assembly, Havana, Cuba, October 1956, Regulation B(3) (edited by the 11<sup>th</sup> World Medical Assembly, Istanbul, Turkey, October 1957, and amended by the 35<sup>th</sup> World Medical Assembly, Venice, Italy, October 1983), available at: [www1.umn.edu/humanrts/instree/armedconflict.html](http://www1.umn.edu/humanrts/instree/armedconflict.html).

17 Art. 10(3) of AP II states: ‘The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.’ Art. 10(4) states: ‘Subject to national law, no person engaged in medical activities may be penalised in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.’

concerning diagnoses and prescriptions'.<sup>18</sup> The prohibition on obliging medical personnel to divulge information protected by professional confidentiality is not formulated as forcefully as the general prohibition on punishment discussed above, since it is 'subject to [the] national law' of each country. In fact, the inclusion of such a vague disposition was not present within the first drafts of AP II.<sup>19</sup> However, even though 'an obligation to systematically reveal the identity of the wounded and sick would divest the principle of the neutrality of medical activities of all meaning',<sup>20</sup> adding the terms 'subject to national law' was the only way that states would have accepted the article concerned.<sup>21</sup> The consequence of this is that the protection of professional confidentiality is lowered and that many sick or wounded individuals would rather refuse medical treatment than take the risk of being denounced.<sup>22</sup> The inclusion of a reference to national legislation responds, in part, to the understanding that the obligation of respect for professional confidentiality is not absolute when divulgation may allow the prevention of the commission of serious crimes of which the doctor might have knowledge. On this, the commentary to Article 10 of AP II provides that '[i]n ethical terms, the rule against denunciation does not mean that information may never be given; the doctor has a certain measure of freedom of action to follow his own conscience and judgment'.<sup>23</sup>

The reference to national legislation can be further explained by looking at the corresponding norm in international armed conflicts, according to which:

no person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party *except as required by the law of the latter Party*, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families.<sup>24</sup>

According to the commentary to this article, during an international armed conflict, a doctor

retains the freedom to denounce a patient on the basis that he may legitimately wish to prevent the patient pursuing activities which he considers to be dangerous for other human beings, just as, in peacetime, he may wish to prevent a criminal from continuing his criminal activities.<sup>25</sup>

18 Hernán Reyes MD, *Medical Neutrality – Confidentiality Subject to National Law: Should Doctors Always Comply?*, November 1996, available at: [www.medekspert.az/en/chapter13/resources/med\\_confid\\_subject\\_law-2.pdf](http://www.medekspert.az/en/chapter13/resources/med_confid_subject_law-2.pdf).

19 ICRC, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949, 1972 Report*, Vol. I, para. 2.376, Geneva, October 1973, p. 148, available at: [www.loc.gov/rr/frd/Military\\_Law/pdf/RC-Draft-additional-protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/RC-Draft-additional-protocols.pdf).

20 ICRC Commentary, para. 4700.

21 *Ibid.*, para. 4684.

22 *Ibid.*, para. 4700.

23 *Ibid.*, para. 4697.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (hereinafter AP I), Art. 16(3) (emphasis added).

25 ICRC Commentary, para. 676.

In this respect, the Inter-American Court of Human Rights addressed the issue of confidentiality in a case against Peru, where the state had condemned a physician for providing medical services to alleged members of the *Sendero Luminoso* (Shining Path), a non-state armed group defined as a terrorist organisation by the state authorities. The Court indicated that:

the State violated the principle of legality: by . . . penalising a medical activity, which is not only an essential lawful act, but which it is also the physician's obligation to provide; and for imposing on physicians the obligation to report the possible criminal behaviour of their patients, based on information obtained in the exercise of their profession.<sup>26</sup>

This jurisprudential contribution is relevant as it states that, even if the obligation of professional confidentiality contained in Article 10(3) of AP II is subject to national law, this national law must be specific enough as to delimit the exceptions to this obligation in accordance with the human rights principle of legality.<sup>27</sup>

### Implementation of the rules of IHL in domestic Colombian law

The Colombian example is of particular interest for the present analysis because of the adoption and implementation of almost all IHL rules into domestic law, and, as will be seen, in some cases even includes further legal rights and obligations, not contemplated in IHL, that are relevant to the humanitarian challenges that the country's protracted non-international armed conflict poses in practice. The great development of IHL at the Colombian domestic level is due, in part, to the regulatory and institutional culture that predominates, in which the state seeks to regulate as many human relationships as possible through legislation and institutionalism. It is also partly due to the experience of the authorities in identifying the varied needs in terms of protection for people affected by the conflict.

IHL treaties ratified by the Colombian state are incorporated into the domestic legal order by virtue of Article 93 of the Constitution, which enables constitutional value to be conferred to international norms.<sup>28</sup> In fact, the Colombian Constitutional Court, when analysing the constitutionality of the incorporation of AP II in domestic legislation, stated that:

the rules of humanitarian assistance to the wounded, sick, and shipwrecked *obviously* imply the provision of guarantees and immunities to those responsible for carrying out such a task, which is why Protocol II protects health and religious personnel (article 9), and medical activity (article 10) and

26 Inter-American Court of Human Rights, *De La Cruz Flores v. Peru*, Judgment, 18 November 2004, para. 102, available at: [www.corteidh.or.cr/docs/casos/articulos/seriec\\_115\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_115_ing.pdf).

27 *Ibid.*

28 See Constitutional Court of Colombia, Sentence C-067 of 4 February 2003, para. 3(B). In this decision the Constitutional Court established that the international norms integrated into domestic law by virtue of the constitutional block are 'real principles and rules with a constitutional value'. The Court added that these international treaties benefit from a 'general and permanent prevalence over the internal legislation' (our translations).

the medical units and transport (articles 11 and 12), which should be respected at all times.<sup>29</sup>

Colombian legislation does not have laws that explicitly implement AP II, but it has various other tools to ensure the protection of the medical mission. For example, Colombian law regulates specifically the use and protection of the Red Cross emblem, which refers to the protection due to ‘civilian sanitary personnel, medical, paramedical and relief personnel, as well as any person performing, permanently or temporarily, humanitarian work in situations of armed conflict or natural disasters’.<sup>30</sup> This goes even further than Article 18 of AP II, which ‘authorises the civilian population to offer its services on its own initiative, and allows the authorities the possibility of declining such an offer’.<sup>31</sup> Indeed, Colombian law not only allows civilians legally to perform humanitarian acts, but also extends the protection provided to medical personnel to anyone that might undertake this task. The protection of the medical mission is furthermore elevated as a constitutional duty because humanitarian work is explicitly considered to be part of the duty of social solidarity, which involves responding ‘with humanitarian actions in situations that endanger the lives or health of human beings’.<sup>32</sup> Even when a doctor provides medical care to a member of an armed group without having been coerced to do so, he must not be considered to be a member of the group or to have collaborated in alleged crimes committed by his patients if his role was limited to providing medical care. It is the duty of the doctor to provide services to anyone who needs them, in accordance with the principle of social solidarity.

In order to guarantee this constitutional principle, the Colombian Criminal Code includes the offence of failing to provide relief or humanitarian assistance to protected persons. It also provides that any person who has a duty to provide relief and assistance to protected persons whose life or health is in great danger and fails to do so without a reasonable justification may be criminally liable.<sup>33</sup>

Moreover, the importance of medical services in times of armed conflict is such that any obstruction or impediment, whether violent or not, to medical, health or relief personnel or the civilian population in carrying out their health and humanitarian work, constitutes a crime under Colombian law<sup>34</sup> and a war crime under the ICC Statute.<sup>35</sup>

As for the legal duty of health-care professionals to care for the wounded and sick without discrimination, it is covered by the Code of Medical Ethics, which states that ‘the doctor shall dispense the benefits of medicine to whoever may need

29 Constitutional Court of Colombia, Sentence C-225 of 18 May 1995, para. 32 (our translation, emphasis added).

30 Decree 138 of 1 January 2005 regulating Arts 5, 6, 14 and 18 of Law 875 of 2 January 2004 and other provisions, Art. 16 (our translation).

31 ICRC Commentary, para. 4876.

32 Political Constitution of Colombia of 1991, Art. 95(2).

33 Colombian Criminal Code, Art. 152.

34 *Ibid.*, Art. 135.

35 Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF.183/9, Art. 8(2)(e), (ii).

it, without limitations other than those expressly stated by the law.<sup>36</sup> Moreover, the rules that provide ways to seek peace and reparation for victims of the armed conflict in Colombia have laid down an obligation that enlarges the duty to attend to the wounded and sick, adjusting it to the national context, in the following terms:

Hospitals, be they public or private, in the national territory, that provide health services, are required to deliver immediate care to victims of terrorist attacks, combats and massacres, caused by the internal armed conflict, and who may require it, independently of the socio-economic capacity of the claimant of these services and without any prerequisite for admission.<sup>37</sup>

This law is complemented by the Victims and Land Restitution Law of 2011 that provides for legal measures for the attention, assistance and reparation of the victims of the Colombian non-international armed conflict. Amongst other things, it reiterates the above mentioned obligation of private and public hospital institutions to deliver care to all victims without discrimination<sup>38</sup> and grants such victims the right to access humanitarian assistance through a differentiated approach to address their immediate and particular needs.<sup>39</sup> Among the medical programmes that the law establishes to achieve this goal are hospitalisation, medicines and transportation, as well as HIV examinations and psychosocial assistance in case of sexual abuse.<sup>40</sup>

Finally, in relation to professional confidentiality, the Constitutional Court has reiterated that this right is inviolable.<sup>41</sup> However, the Court makes an exception: in extreme situations, when the revelation of such information could prevent the commission of a serious crime, the health-care professional can disclose it without the risk of being sanctioned for violating his or her duty of confidentiality.<sup>42</sup> The Supreme Court adds that professional confidentiality is not a privilege for the professional that has access to the information, but that it is meant to protect the patient's fundamental rights of intimacy, honour and good name.<sup>43</sup> Moreover, in Colombia, the obligation to denounce the commission of crimes by individuals is circumscribed only to crimes with great social impact<sup>44</sup> such as genocide, torture and forced displacement.<sup>45</sup>

36 Law 23 of 18 February 1981 establishing rules on medical ethics, Arts. 6 and 7; Decree 3380 of 30 November 1981 regulating Law 23 of 18 February 1981, Art. 4.

37 Law 782 of 23 December 2002, through which extends the application of Law 418 of 17 December 1997, extended and amended by Law 548 of 23 December 1999 and modifying some of its provisions, Art. 19 (our translation).

38 Law 1148 of 10 June 2011, through which measures for the integral attention, assistance, and reparation of the internal armed conflict are dictated, Art. 53.

39 *Ibid.*, Art. 47.

40 *Ibid.*, Art. 54.

41 Constitutional Court of Colombia, Sentence C-411 of 1993, para. 5.2.2.

42 *Ibid.*

43 Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 14043 of 7 March 2002, para 4.

44 Constitutional Court of Colombia, Sentence C-853 of 2009, para 6.2.

45 Colombian Criminal Code, Art. 441.



## The crime of rebellion and health-care activities in Colombian criminal law

As explained in the first part of this article, the standards on the protection of the medical mission have been incorporated into, and adjusted to, the Colombian context, providing a comprehensive framework for the protection of medical personnel. Nevertheless, the protection of medical activities explained above is called into question when exercised in situations or conditions that could be interpreted as exceeding the strictly humanitarian nature of the medical mission's work, constituting acts that, one way or another, benefit the activities of the non-state armed group and hence could legitimately be punishable under domestic criminal law. This situation leads to the question of when medical acts exceed humanitarian activities to become acts that effectively support a non-state armed group. To answer this question, we will clarify the constitutive elements of the crime of rebellion under the Colombian Criminal Code.

### The crime of rebellion in Colombian domestic law and case law

#### *Objective elements of the crime of rebellion*

In order to analyse the crime of rebellion, we first have to understand the notion of 'membership of an armed group' during an armed conflict. The concept of 'membership' under the Colombian domestic law on rebellion should be distinguished from the notion of 'membership' that arises under IHL. Indeed, under IHL, the International Committee of the Red Cross (ICRC) *Interpretive Guidance on Direct Participation in Hostilities* provides that those members of an armed group whose specific function is to continuously commit acts that constitute direct participation in hostilities (that is, those who have a continuous fighting function) do not benefit from the rules that protect civilians from attacks. This notion of 'membership of an armed group' is necessarily restrictive since its main objective is the protection from attacks of those civilians who do not directly participate in hostilities.<sup>46</sup>

Different from the above, the concept of 'membership' in an armed group in the framework of Colombian national criminal law is understandably broader since it is generally punished under the crime of rebellion, which encompasses all kinds of acts that are directed at destabilising the state's institutions.<sup>47</sup> The difference between the interpretation of the concept of 'membership' under IHL and under domestic criminal law can be illustrated by the act of providing funding to a non-state armed group. Under IHL, this does not constitute direct participation in hostilities and therefore a person who provides funds to such a group does not lose

46 See Nils Melzer, *Interpretive Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009. For more extensive information on Direct Participation in Hostilities and the civilian's loss of protection against attacks, see in particular p. 33 on the notion of 'membership in an armed group'.

47 Colombian Criminal Code, Art. 467.

his or her protection against attacks. However, under Colombian criminal law, providing funding to an armed group could be considered as an act of collaboration with the group and would therefore be punishable as a crime of rebellion.

Prior to the approval of AP II – approved in Colombia by Law 171 of December 1994 and ratified in August 1995 – the Colombian jurisprudence had established a definition of the expression ‘to be part of, or collaborate with, an armed group’ and specified that:

acts of rebellion not only refer to armed confrontations with members of the Security Forces, to the point that this type of crime also finds realisation in the mere belonging of the individual agent to the rebel group and, for this reason, a person may be assigned any activity, such as financing, providing ideologies, planning, recruiting, advertising, deployment of international relations, education, indoctrination, communications, intelligence, infiltrations, supplies, *medical care*, or any other activity that does not relate directly to the use of weapons but that is a suitable instrument for the maintenance, strengthening or functioning of the rebel group.<sup>48</sup>

This configuration of the crime of rebellion provides punishment not only for those who carry out armed activities on behalf of the group, but also for those who perform different roles within the group. However, such a broad interpretation ceased to be valid with regard to the provision of medical care with the ratification of AP II which, as we have seen in the first part of this article, prohibits the punishment of medical personnel for carrying out medical activities strictly in accordance with medical ethics. The rest of the activities listed in the aforementioned judicial decision are still present in the Colombian jurisprudence as constitutive of the crime of rebellion if they are carried out with the intention to participate in the strengthening and stability of the activities of the group and hence to support its ultimate goal of overtaking the state institutions, provided that the collaboration is subject to a functional and predetermined division of labour.<sup>49</sup>

### *Subjective elements of the crime of rebellion*

In Colombia, the crime of rebellion provides for the punishment of ‘those who, through the use of arms, intend to overthrow the national government or remove or modify the existing constitutional or legal regime’.<sup>50</sup> Recently, Colombian tribunals have given more weight to the subjective part of the crime of rebellion, adding that more than the performance of any activity by the non-state armed group, the subjective element of the crime (or *mens rea*) has to be very specific in order for this crime to be materialised. As has been raised by the Higher Tribunal of the Northern

48 Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 7504 of 12 August 1993, cited in Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 33558 of 7 July 2010, p. 25 (our translation, emphasis added).

49 Supreme Court of Justice of Colombia, Criminal Cassation Chamber, case No. 33558 of 7 July 2010, p. 22–24.

50 Colombian Criminal Code, Art. 467.

Judicial District of Santander, from the perspective of domestic law, within non-state armed groups each person carries out different and well-defined roles, working jointly with a division of labour towards a common criminal purpose: overthrowing the legally constituted government. This means that, for a crime of rebellion to exist, the person must have been aware of the criminal purpose of the group to overthrow the legally constituted government, and must have had the intention to contribute to it.<sup>51</sup> However, in cases where this special intent to overthrow the government cannot be proved, the person who finances, promotes, arms or trains a non-state armed group could still be charged with conspiracy,<sup>52</sup> training for illicit activities,<sup>53</sup> administration of resources related to terrorism,<sup>54</sup> and so on.

Another element follows from the argument from the Office of the Attorney General in a case analysed by the Second Criminal Circuit Court of Villavicencio, which established that:

the classification of the crime of rebellion requires that the active subject develops such behaviour in a continuous and permanent fashion . . . [The crime will not be attributed to the individual] if he does not have the knowledge or the desire to participate in the objectives of the group (in this case, the Revolutionary Armed Forces of Colombia – FARC), with a permanent duration . . .<sup>55</sup>

This judgement establishes that the crime of rebellion constitutes a permanent act, meaning that a person responsible for rebellion will be criminally liable for the whole duration of his or her membership of the armed group.<sup>56</sup> Moreover, it suggests that the ‘acts must be voluntarily or intentionally linked’<sup>57</sup> to the objective of the armed organisation to overthrow the national government or to change the current constitutional and legal regime. This means that there is also a subjective element in the crime of rebellion: the action must be voluntary and guided by a specific intention in order for a person to be prosecuted for its commission.

In line with the above, in the context of another case, the Supreme Court of Justice of Colombia denied that members of paramilitary armed groups could be liable for the crime of rebellion since they were not seeking to overthrow the national government or to remove or modify the existing constitutional or legal regime, but were rather pursuing individual opportunistic interests. The Court raised the following particularities about the crime of rebellion:

- the legal interest protected is the constitutional regime and the national institutions;

51 Higher Tribunal of the Northern Judicial District of Santander, Criminal Decision Chamber, Ordinary Condemnatory Sentence, second instance, Case No. 54-498-31-04-002-2007-00111-01, 9 July 2009.

52 Colombian Criminal Code, Art. 340.

53 *Ibid.*, Art. 341.

54 *Ibid.*, Art. 345.

55 Second Criminal Circuit Court of Villavicencio, Case No. 50001310400220090002800 of 28 April 2010 (our translation).

56 Supreme Court of Justice of Colombia, Criminal Cassation Court, Case No. 19915 of 10 June 2005, p. 29 (our translation).

57 *Ibid.*

- the objective part of the crime is constituted by the attempt to overthrow the existing government through violent means;
- the subjective element of the crime is that the accused must have had the intent to disturb the existing legitimate government in order to establish another one while knowing the obligation to respect state institutions.<sup>58</sup> This means the accused must have been aware of the illegality of his or her act but performed it anyway.

The Court, as well as other high tribunals in the country, found that what distinguishes the crime of rebellion from other ordinary crimes is its intrinsic political purpose and agenda of institutional change.<sup>59</sup>

In summary, in the context of the Colombian non-international armed conflict, the crime of rebellion should not include the mere provision of medical services to members of the armed group that may require it, so as to enable the respect for the principle of non-discrimination, as explained in the first part of this article. However, if a doctor provides medical services to members of a non-state armed group with a continuous and permanent intention to overthrow the existing government, then he could be held criminally liable for an act of rebellion.

### Activities of medical personnel that appear to go beyond what is internationally protected as a legitimate humanitarian service

Despite the clarifications provided by the jurisprudence, there remains the question of the threshold at which the provision of medical services exceeds the obligation of social solidarity and becomes membership of, complicity with, or simply effective support to an armed group. The following part of this article will address situations in which the status of medical personnel has been questioned on the grounds that their work has exceeded the limits of its humanitarian nature, and hence has become an active part of the objective element of the crime of rebellion. These situations will be analysed in the framework of the Colombian jurisprudence – of courts at different levels – based on the premise that the medical activities referred to have been carried out voluntarily and have been confined to the provision of services related to medical or health activities.

### *Administrative procedures for accessing health-care facilities and specialists*

The conduct of administrative procedures by health-care personnel brings up the question of the limits of the medical mission. The Colombian Supreme Court of Justice criminally condemned a medical professional who, in addition to having provided medical and surgical services to members of an armed group party

58 Supreme Court of Justice of Colombia, Criminal Cassation Court, Case No. 26945 of 11 July 2007, p. 24.

59 Constitutional Court of Colombia, Sentence C-009 of 17 January 1995, para. 3.2.2.

to the conflict, ‘also managed the patients that were sent to [the hospital in] Bogotá, referring them, whenever necessary, to specialised clinics depending on the pathology they presented’.<sup>60</sup>

In our opinion, though open to interpretation, neither the objective nor the subjective elements of the crime of rebellion are met in this example. The objective part is not met as the activity itself has been classified as being a part of the health-care professional’s medical activities, and hence protected by IHL. As for the subjective part, it would have to be proved, as the mere remission to legally constituted clinics and hospitals does not prove in itself the criminal purpose of intentionally aiming to overthrow the legally constituted government. Moreover, even if he or she knows of a patient’s membership of a criminal group, the health-care provider does not have the obligation to denounce it, by virtue of professional confidentiality and of the limitations to the duty to denounce previously mentioned.

It should also be noted that, even though an activity may fall into the realm of ‘medical activities’ protected by IHL, the fact that a person performs this duty permanently in favour of members of an armed group has raised questions within the jurisprudence. In the example given here, the Supreme Court of Justice considered that the medical activities performed by the accused, even though they had no relation with the armed confrontation, strengthened the guerrilla group since healed members of the group would subsequently return to fight against the government armed forces. This, according to the Court, was enough to condemn the accused for the crime of rebellion.<sup>61</sup>

### *Recurrence of the provision of health-care and subsequent medical controls*

The Colombian domestic jurisprudence has often indicated that, if health care is provided to members of an armed group party to the conflict more than once without being reported to the authorities, the medical personnel involved in such activities could be accused of rebellion for failing to report such facts. This jurisprudence has generated an important debate regarding the scope of professional confidentiality. As an example, a doctor was accused of the crime of rebellion by the prosecutor in charge:

because he was identified as the person who healed and secretly met two members of the FARC on several occasions. He provided them not only with surgery but also prescribed medicines for after care . . . keeping his reserve so as to protect the person he attended, a fact that from the objective point of view indicates the commission of the crime of rebellion.<sup>62</sup>

Contrary to this position, it is the understanding of the authors that the members of the medical personnel may not be prosecuted for rebellion, as long as they are acting

60 Supreme Court of Justice of Colombia, above note 7, p. 3 (our translation).

61 *Ibid.*, p. 12 (our translation).

62 Criminal Circuit Court 49, Case No. 2006-188 of 16 September 2009 (our translation).

in compliance with their legal duty, for the period of time that is necessary for the full recovery of the patient. It is not in their hands to decide the number of times that they should attend to people; this should be strictly justified by the state of health of the patient.

Hence, the objective element of the crime of rebellion would still not be present since the execution of surgery and corresponding follow-up with medicines are part of the medical activities protected by IHL and by national law. The subjective element would not be met because the aim, though repetitive, is always concerned with the healing of the patient and not the overthrow of the government.

### *Urgent care and compensation*

As for urgent care, the Colombian Supreme Court of Justice analysed a case involving a pharmacist who had provided medical assistance to a member of the guerrilla forces days after he had been injured by gunfire. The Court considered that the medical services given did not constitute an emergency as they were ‘not provided under the Hippocratic Oath of humanitarian assistance to the wounded of war or combat, but much later, when the rebels required his services . . . be it in his office or in clinics, where he took care of them’.<sup>63</sup> This position shows that ‘humanitarian aid’ can be considered by some as a response to an emergency where the lack of appropriate public or private services gives no alternative but to attend to the person that needs it.<sup>64</sup>

In other words, some Courts in Colombia have concluded that, in order not to be accused of the crime of rebellion, the doctor must be able to prove that the care provided was needed immediately. On the contrary, we consider that the care given to wounded and sick members of an armed group need not be emergency care but may also be mid- or long-term treatment, in light of the IHL rules referring to the wounded and the sick as protected persons. A definition that might come in handy in the present analysis is the one provided by Additional Protocol I to the Geneva Conventions, applicable in international armed conflicts (but which also applies to non-international armed conflict as stated in the ICRC’s Commentary<sup>65</sup>), that defines the wounded and sick as ‘persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility’.<sup>66</sup>

With respect to compensation for the provision of health services, the Colombian jurisprudence has analysed situations in which medical specialists were accused of rebellion for ‘receiving financial compensation’ as a retribution for their medical and health services to FARC members.<sup>67</sup> It was considered by the prosecution that the fact that doctors received money for their services eliminated the merely ‘humanitarian’ character of their actions. In other words, the prosecution

63 Supreme Court of Justice of Colombia, above note 7, p. 12 (our translation).

64 Criminal Circuit Court 49, above note 62.

65 ICRC Commentary, para. 4637.

66 AP I, Art. 8(a); ICRC Customary Law Study, Rule 109, p. 399.

67 Second Criminal Circuit Court of Villavicencio, above note 55.

was equating the humanitarian nature of medical acts with volunteerism. In this regard, it should be noted that, according to the Colombian Code of Medical Ethics, anyone who provides a legitimate service has the right to receive an economic compensation for the care given. Medical personnel, like any other workers, are protected by the constitutional right to dignified conditions of labour,<sup>68</sup> which include payment for the services they provide. According to the Constitutional Court, dignity and justice in relation to work conditions are realised in a remuneration that is proportional to the quantity and quality of the activity provided by any worker, in this case a health-care provider, who offers his or her services in a public or private capacity.<sup>69</sup> In our view, payment does therefore not necessarily negate the humanitarian nature of the service provided.

## Conclusion

States in whose territory a non-international armed conflict is occurring have the prerogative to restore their internal order through legal means. This may include criminal sanctions to those who belong to armed groups, imposed under the framework of international legal standards. However, this prerogative should not fail to take into account the provisions of Article 10 of AP II and other rules of customary IHL<sup>70</sup> which prohibit punishing individuals who have committed acts which comply with medical ethics, in light of the duty to assist the wounded and sick.

Although the above mentioned protective measures may seem obvious, in the context of non-international armed conflicts there are still situations in which civilian doctors and other civilian providers of health care are condemned for exercising their medical work, as it is considered that they have exceeded the limits legally permitted in the framework of their humanitarian duties, becoming effective collaborators of a non-state armed group.

It is imperative that the domestic law of states delimit very precisely the constitutive elements of the crimes of which one may be accused in connection to conduct executed in relation to, or in the framework of, an armed conflict – including those committed by health-care personnel. A broad or vague definition or interpretation of the concept of ‘membership of an armed group’ within domestic law, disregard of IHL obligations of protection in this regard, and lack of knowledge of the national legislation on medical ethics, rights, and obligations could put at risk the effective protection of health-care personnel and the medical mission, which could in turn endanger the access of the wounded and sick to medical assistance.

68 Political Constitution of Colombia of 1991, Arts. 25 and 53.

69 Constitutional Court of Colombia, Sentence T-161 of 1998, para 2.

70 ICRC Customary Law Study, Rule 26 (applicable in international and non-international armed conflicts).